ATTORNEY FOR APPELLANT:

LEANNA WEISSMANN
Lawrenceburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

KELLY A. MIKLOS
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

JAMES NUXOLL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 69A01-0606-CR-227
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE RIPLEY CIRCUIT COURT
The Honorable Carl Taul, Judge
Cause No. 69C01-0510-FC-17

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

James Nuxoll challenges his eight-year sentence for operating a vehicle as an habitual traffic violator suspended for life, a Class C felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

In September 1999, Nuxoll was convicted of being an habitual traffic violator and his driving privileges were suspended for life. In September 2005, police stopped Nuxoll because he was not wearing a seatbelt. He told the officer he did not have a driver's license on him but provided his name and date of birth. A check of this information revealed Nuxoll was an habitual traffic violator whose license had been suspended for life.

A jury found Nuxoll guilty of operating a vehicle as an habitual traffic violator suspended for life. The sentencing court found two aggravating circumstances, his prior criminal history and that he "is a poor candidate for probation." (App. at 85.) It sentenced Nuxoll to eight years in the Department of Correction.

DISCUSSION AND DECISION

"The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B). Under this rule, the burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *McMahon v. State*, 856 N.E. 2d 743, 749 (Ind. Ct. App. 2006). This examination could include a challenge to the aggravating and mitigating

[1] Ind. Code § 9-30-10-17.

circumstances found by the trial court under Ind. Code § 35-38-1-7.1.[2] *Id.* Therefore, if a trial court relies on aggravating or mitigating circumstances to impose a sentence other than the advisory, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *Id.* at 749-50.

An inappropriateness review is not limited, however, to a rundown of the aggravating and mitigating circumstances found by the trial court. *Id.* at 750. Although the trial court may have followed the proper procedure in imposing a sentence, App. R. 7(B) authorizes an independent appellate review and revision of the sentence. *Id.*

A Class C felony is punishable by a fixed term between two and eight years; the advisory sentence is four years. Ind. Code § 35-50-2-6. The trial court found two aggravators[3] and no mitigators, and sentenced Nuxoll to eight years.

Nuxoll argues the trial court erred by failing to find as a mitigating factor the hardship his incarceration will cause his family. He testified he is "supposed to pay" $75 per week in child support[4] and would be unable to do so if he were incarcerated. (Tr. at 171.) Many persons convicted of serious crimes have children and, absent special

---

[2] Trial courts are allowed to impose any sentence authorized by statute regardless of the presence or absence of aggravating and mitigating circumstances. Ind. Code § 35-38-1.7-1(d). Consequently, "a chosen sentence cannot constitute an abuse of discretion." *McMahon*, 856 N.E. 2d at 748. However, we agree with Judge Vaidik's reasoning as to why "an assessment of the trial court's finding and weighing of aggravators and mitigators continues to be part of our review on appeal" under Indiana's new sentencing scheme. *Id.*

[3] Nuxoll does not challenge the aggravating circumstances found by the trial court.

[4] Nuxoll agreed the pre-sentence report "indicates" he is paying child support and he is "supposed to pay" $75 per week. (Tr. at 171.) No evidence was introduced to indicate whether Nuxoll was current or in arrears on this child support.

circumstances, trial courts are not required to find imprisonment will result in an undue hardship. *Dowdell v. State*, 720 N.E.2d 1146, 1154 (Ind. 1999). Because Nuxoll did not demonstrate special circumstances, the trial court appropriately declined to consider the alleged hardship on his dependents as a mitigating factor.

With respect to aggravating circumstances, the trial court noted Nuxoll had five prior felony convictions and six prior misdemeanor convictions. The court gave particular weight to a prior conviction of operating as an habitual traffic violator. It also noted Nuxoll was on probation when he was charged with misdemeanor possession of marijuana, and he had been given "ample opportunity for counseling" but none "seemed to have benefited him." (Tr. at 174.) The trial court concluded there was "ample evidence in the record" to support an eight-year sentence. (*Id.*)

In considering the nature of the offense, we note Nuxoll did not operate his vehicle in an unsafe manner and was not under the influence of drugs or alcohol at the time he was arrested. However, he was driving a car six years after his driving privileges had been suspended for life.

Nuxoll's character is demonstrated by his nearly twenty-year criminal history. Nuxoll has prior convictions of carrying a concealed weapon, escape, possession of cocaine, possession of marijuana, battery, driving under the influence, and driving while suspended. He was adjudged an habitual traffic violator in 1999. He has committed offenses while on probation. Nuxoll has not taken full advantage of the opportunities, in the form of counseling or treatment, to resolve his alcohol-related problems. Although he has received executed sentences of up to two years, suspended sentences, in-home

detention, probation, and counseling, Nuxoll remains unwilling to conform his conduct to the law.

After considering the aggravators, mitigators, Nuxoll's character, and the nature of his offense, we cannot conclude his eight-year sentence is inappropriate. Accordingly, we affirm.

Affirmed.

RILEY, J., concur.

BAILEY, J., concurring in result.